

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT MYRON LATHAM,

Defendant.

Case No. 2:06-cr-00379-LDG-GWF

**FINDINGS & RECOMMENDATIONS**

This matter is before the Court on Defendant Robert Myron Latham's Motion to Dismiss for Failing to Preserve Potentially Exculpatory Evidence (#116), filed on July 22, 2008 and the Government's Response to Defendant's Motion to Dismiss (#118), filed on August 4, 2008. The Court conducted an evidentiary hearing in this matter on August 8, 2008.

**FACTUAL BACKGROUND**

Defendant Robert Myron Latham is charged in a three count Indictment, filed on November 15, 2006, with transporting child pornography, receipt of child pornography and possession of child pornography in violation of 18 U.S.C. § 2252A(a)(1) (2) and (5)(B). The indictment arises out of evidence that the Government seized during the search of a residence on June 1, 2005 pursuant to a search warrant issued by United States Magistrate Judge Lawrence R. Leavitt. The affidavit in support of the search warrant stated that on February 25, 2005 a person using a computer with Internet Protocol ("IP") address 68.224.236.152 downloaded images of child pornography from a child pornography website through a "peer to peer" ("P2P") file sharing program known as "Limewire." On the date that the images were downloaded, IP address 68.224.236.152 was assigned to Larry Latham who resided at 6420 East Tropicana Avenue, Unit 164, Las Vegas, Nevada 89122. Based on the affidavit, Magistrate

1 Judge Leavitt concluded that there was probable cause to believe that evidence of child pornography  
2 would be found on the premises located at 6420 East Tropicana Avenue, Unit 164, Las Vegas, Nevada  
3 89122. The search warrant authorized the Government to seize and search computers found on the  
4 premises for evidence of child pornography. *See Findings & Recommendations and Order Denying*  
5 *Franks Hearing* (#56), as adopted by the District Judge on December 18, 2007. *Order* (#70).

6 Federal agents executed the search warrant on June 1, 2005 at which time they determined that  
7 the residence was occupied by Larry Latham, his brother, Defendant Robert Latham, and Sherryl Carroll,  
8 Larry Latham's wife. The agents discovered three computers in the residence: an "E-Machine" desktop  
9 computer, a generic desktop computer and a laptop computer. For purposes of this motion, it is  
10 undisputed that the three computers used the same wireless router which permitted them to connect to  
11 the Internet through IP address 68.224.236.152. The three computers were also connected to each other  
12 in a shared network. The Government alleges that during the execution of the search warrant, Defendant  
13 Robert Latham agreed to speak with the FBI agents and told them that the laptop computer located in his  
14 bedroom belonged to him and that he was its sole user. Defendant Latham allegedly admitted that he  
15 had the Limewire program loaded on his laptop computer and used it to download music and pictures of  
16 underage girls and that he saved the pictures that he liked in different folders on the laptop computer  
17 which were organized and labeled by the types of images. Defendant also allegedly told the FBI agents  
18 that "he hid these folders in the Card Shop file on his computer so that someone else would not come  
19 across them accidentally." *Government's Response* (#118), pp. 5-6.

20 The agents seized the two desk top computers found on the premises – the generic desktop  
21 computer and an "E-Machines" computer which belonged respectively to Larry Latham and Sherryl  
22 Carroll. According to the Government, when its forensic examiner attempted to make a forensic image  
23 of "E-Machine" computer's hard drive, he determined that it was corrupted to such an extent that it  
24 could not be imaged. The forensic examiner was able to make an image of the generic computer's hard  
25 drive and upon examination of that image no child pornography was found. The Government returned  
26 these two computers to Larry Latham on June 13, 2005. The agents also seized Defendant Robert  
27 Latham's laptop computer and a forensic examination of the image of that computer allegedly revealed  
28 over 600 images of child pornography which were saved in well-organized folders labeled by name and

1 category. *Government's Response* (#118), p. 6.

2 In support of his Motion to Dismiss, Defendant submitted an affidavit by Lawrence Edward  
3 Latham ("Larry Latham") who stated that the E-Machines computer and the generic computer were  
4 returned to him on June 13, 2005. *Motion to Dismiss for Failing to Preserve Potentially Exculpatory*  
5 *Evidence* (#116), *Exhibit "B"*, ¶ 4. Larry Latham stated that he attempted to use both computers that day  
6 and found that they were inoperable. He stated that all data on the computers' hard drives had been  
7 destroyed and could no longer be retrieved. *Id.*, ¶¶ 5, 6. Mr. Latham stated that he later disposed of both  
8 computers because they had no value and could not be used in any way. *Id.*, ¶ 7. *See Government's*  
9 *Hearing Exhibit "1."*

10 Larry Latham testified at the evidentiary hearing on August 8, 2008 that at the time of the search,  
11 Robert Latham had been residing at that residence approximately a month or two. On cross examination,  
12 he acknowledged that he may have told the FBI that Defendant had been residing at his residence since  
13 February 8, 2008, but did not recall specifically making such a statement. Mr. Latham testified that  
14 Sherryl Carroll also resided at the residence. He testified that in addition to himself, Sherryl Carroll and  
15 Defendant, one of Larry Latham's sons stayed at the residence from time to time and used the computers.  
16 Mr. Latham also stated that visitors to the house would use the computers on occasion. It appears from  
17 Mr. Latham's testimony that he referred to the use of his generic desktop computer and/or Ms. Carroll's  
18 "E-Machine" desktop computer.

19 Larry Latham testified that the three computers were connected by a cable modem and wireless  
20 router and were networked together to share resources, including sharing data between the three  
21 computers. He stated that all three computers were operating "just fine" on the day they were seized by  
22 the Government. He testified that he has worked with computers since 1978 and was involved in  
23 working with computers and computer systems during his previous employment. He testified that the  
24 generic computer and Sherry Carroll's "E-Machine" computer were returned to him approximately a  
25 week or ten days after the search. Mr. Latham testified that FBI Agent Gruninger, who returned the  
26 computers, told him that the computers were damaged. He further testified that Agent Gruninger told  
27 him that the "E-Machine" computer was so damaged that he could not even image it.

28 . . .

1 Mr. Latham testified that after the generic desktop computer and “E-Machine” desktop computer  
2 were returned, he could not “boot” either of them. He was never able to start the “E-Machine”  
3 computer, or repair or fix it. Mr. Latham testified that he discarded the “E-Machine” computer within a  
4 couple of weeks after it was returned by the Government. The generic computer would not “boot,” but  
5 he was able to reformat it with other hard drives and reinstall programs on it and thereafter used it for  
6 some undetermined time period. He stated, however, that he was not able to recover the data that had  
7 been stored on the hard drive at the time it was seized on June 1, 2005. He eventually replaced the  
8 generic computer because it was old and slow and because he needed a more updated computer. Mr.  
9 Latham testified that he could not determine how the computers were damaged.

10 Larry Latham testified that at the time he discarded the computers, no criminal charges had been  
11 filed against him or Defendant Robert Latham. He was not told by the Government or anyone else that  
12 he should preserve the computers. Mr. Latham testified that he cannot remember if he told the FBI that  
13 the generic computer was also damaged, although he contacted the FBI from time to time to find out if  
14 other items seized during the search were going to be returned.

15 Larry Latham testified that he set up the shared network for the three computers. He did not  
16 install secure passwords to access the computers or the shared network. He also testified that he left his  
17 generic computer on all the time. Thus, visitors to the house would be able to use the computers and  
18 access the shared network folder.<sup>1</sup> Mr. Latham testified that another person using the generic computer  
19 or “E-Machine” computer would only be able to access the common or shared folder located on  
20 Defendant’s laptop computer. Mr. Latham testified that because of his computer knowledge or “savy,”  
21 he would probably have been able to access nonshared folders on Defendant’s laptop computer through  
22 his generic computer. He did not indicate, however, that he had ever did so. Mr. Latham testified that  
23 he used his brother’s laptop computer from time to time to make sure it was working okay. Other than  
24 defragmenting his brother’s computer or cleaning it up, Mr. Latham testified that to his knowledge  
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26 <sup>1</sup>During the hearing, the parties used the term “folder” to describe the locations on the computers  
27 where information was located. While the Court is unsure that the term “folder” is the correct technical  
28 term for the locations where information was stored on the computers, the Court follows the terminology  
used by the witnesses and counsel during the hearing.

1 Defendant was the only user of the laptop computer.

2 Mr. Latham testified that he did not download child pornography to his generic computer or place  
3 child pornography on Defendant's laptop computer. He also testified that he seriously doubted that  
4 Sherryl Carroll downloaded child pornography to the "E-Machine" computer, and he does not believe  
5 she downloaded anything onto that computer. He testified that he was not aware of a folder called "Card  
6 Shop" on Defendant's laptop computer and does not believe there was such a folder. He did not set up  
7 "well organized folders" on Defendant's laptop computer that contained and categorized images of child  
8 pornography which the Government alleges were found in the "Card Shop" folder located in the laptop  
9 computer.

10 Defendant also submitted an affidavit by computer expert Adrian L. Mare. *Motion to Dismiss for*  
11 *Failing to Preserve Potentially Exculpatory Evidence (#116), Exhibit "A."* Mr. Mare stated in his  
12 affidavit that he examined the computer hard drive seized by the Government, i.e., the laptop computer's  
13 hard drive. *Id.*, ¶ 3. He also stated that he examined photographs of Defendant's home supplied by the  
14 Government which showed that the computers were connected together via a peer network and were also  
15 connected to a wireless router. He stated that a peer network is unsecured and can be accessed by others.  
16 *Id.*, ¶4. Mr. Mare examined the laptop computer hard drive seized by the Government and found that the  
17 hard drive was shared. *Id.*, ¶ 5. He stated that in order to establish whether there were different users  
18 accessing the three computers, it would be important for him to examine the hard drives of all connected  
19 computers seized by the Government. *Id.*, ¶ 6.

20 Mr. Mare testified at the evidentiary hearing that he was retained by Defendant's previous  
21 counsel, the Federal Public Defender, approximately two years ago.<sup>2</sup> After he was retained, Mr. Mare  
22 determined that the three computers were connected to the same wireless router and peer network and  
23 that there was a shared area on the three computers. Mr. Mare testified, however, that prior to May or  
24 June of this year, he only asked to examine the laptop computer, even though he was aware of the  
25 existence of the desktop computers and that the three computers were connected to each other by a

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27 <sup>2</sup>The Court infers from Mr. Mare's testimony that he was retained after the Indictment was filed  
28 in November 2006. Therefore, Mr. Mare's involvement as Defendant's expert in this case is less than  
two years.

1 common network at the time of the search. He acknowledged that he had previously visited the FBI  
2 office to inspect the laptop computer, but did not request permission to inspect the other computers  
3 during those visits. After Defendant's present counsel took over the case in May 2006,<sup>3</sup> Mr. Mare  
4 testified that he had a discussion with defense counsel and told him that he needed examine the two other  
5 computers that were connected to the laptop computer. Mr. Mare states that he told Defendant's counsel  
6 that the computers were "mapped together" or networked together, and that by examining the other two  
7 computers he would be able to determine who else had access to the laptop computer and whether the  
8 other computers were sharing different files with the laptop.

9 Mr. Mare testified that from his examination of the laptop computer, he knows that the other two  
10 computers had access to it. He further testified that an examination of the other computer hard drives  
11 would allow him to determine dates and times that persons logged on and off those computers and what  
12 websites were accessed by the users of those computers. He would also be able to determine how many  
13 persons used the computers and who the users were based on their profiles. Mr. Mare testified that if the  
14 hard drives for the generic computer and "E-Machine" computer were available for examination, he  
15 would be able to determine from their hard drives whether data was transferred to those computers from  
16 another computer. He testified that he cannot make this determination without examining the other  
17 computer hard drives.

18 Mr. Mare also testified, however, that the user of the laptop computer could download data from  
19 the Internet to the laptop without the data going to the other two computers. The data downloaded by the  
20 laptop computer user would go directly to the laptop computer and the laptop computer user could then  
21 transfer the data to the shared folders in the other two computers.

22 Mr. Mare testified that to his knowledge when the Government performs a forensic examination  
23 of a computer, it normally makes a forensic image, or bit stream copy of the computer's original hard  
24 drive. He stated that the Government will not turn the computer on until it makes the forensic image  
25 copy of the original hard drive. Mr. Mare indicated that he recently asked about access to the images of  
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27 <sup>3</sup>The Court Docket indicates that Mr. Jackson was appointed as Defendant Latham's counsel on  
28 May 6, 2008. *See Minutes of Proceedings* (#99).

1 the two other computers. He did not testify what the Government's response was, although he  
2 apparently has not received access to a forensic image of the generic computer if it still exists.

3 Mr. Mare testified that in order for a user of one of the other computers to get into the shared area  
4 used by the three computers, the user would have to enter his user name and password in the shared  
5 folder. Mr. Mare testified that data located on one of the other two networked desktop computers could  
6 only be transferred from those computers into the designated shared folder on Defendant's laptop  
7 computer. Only Defendant, or another person using the laptop computer, however, could transfer data  
8 from the shared folder into one of the non-shared folders on the laptop computer. Mr. Mare testified that  
9 he could determine from Defendant's laptop computer when Defendant logged on and off that computer  
10 and when he accessed particular Internet websites and how often.

11 Mr. Mare also acknowledged that the laptop computer contains many child pornography images  
12 which are contained in well organized folders which have names regarding the type of images contained  
13 in the folder. Based on his examination of the laptop computer, there is no evidence that anyone other  
14 than Defendant put the child pornographic images on that computer. Mr. Mare testified that the well  
15 organized folders containing images of child pornography in the laptop computer are located in the  
16 "Card Shop" folder which is not a shared folder with other computers. He testified that those folders  
17 would have been created by Defendant or a person using the laptop computer. Mr. Mare testified that he  
18 has not examined the laptop computer to determine if it is secured.

### 19 DISCUSSION

20 Defendant argues that the Court should dismiss the Indictment in this case because the  
21 Government failed to preserve potentially exculpatory evidence – the "E-Machine" desktop computer  
22 and Larry Latham's generic desktop computer or the forensic image of the hard drive of that computer.  
23 Defendant argues that if the hard drives of those computers had been preserved, his computer expert, Mr.  
24 Mare, would have been able to determine through forensic examination whether (1) a computer had been  
25 tampered with; (2) whether someone may have hacked into the desktop computers; or (3) whether illegal  
26 data similar to that found on Defendant's computer was also on the desktop computers. Defendant states  
27 that this would establish that whoever had access to the desktop computers may have been responsible  
28 for the illegal images found on Defendant's computer. *Motion to Dismiss (#116)*, pp. 2-3.



1 In *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), the Supreme  
2 Court reversed a California court of appeals decision which held that Intoxilyzer test results were not  
3 admissible in drunk driving prosecutions because the state had not preserved breath samples which could  
4 be independently tested by defendants' experts to determine if their blood-alcohol content exceeded the  
5 legal limit at the time the Intoxilyzer tests were performed. The Supreme Court stated that under the  
6 Due Process Clause, criminal prosecutions must comport with prevailing notions of fundamental  
7 fairness. The Court noted that it had long interpreted this standard of fairness to require that criminal  
8 defendants be afforded a meaningful opportunity to present a complete defense, and that to safeguard  
9 that right, the Court had developed "what might loosely be called the area of constitutionally guaranteed  
10 access to evidence." *Trombetta*, 104 S.Ct. at 2532, quoting *United States v. Valenzuela-Bernal*, 458 U.S.  
11 858, 867, 102 S.Ct. 3440, 3447, 73 L.Ed.2d 1193 (1982). While this standard had been applied in other  
12 contexts, the Court noted that it had never squarely addressed the government's duty to take affirmative  
13 steps to preserve evidence on behalf of criminal defendants. The Court stated:

14 Whenever potentially exculpatory evidence is permanently lost, courts face  
15 the treacherous task of divining the import of materials whose contents are  
16 unknown and, very often, disputed. (citation omitted). Moreover  
17 fashioning remedies for the illegal destruction of evidence can pose  
18 troubling choices. In nondisclosure cases, a court can grant the defendant  
19 a new trial at which the previously suppressed evidence may be  
20 introduced. But where evidence has been destroyed in violation of the  
21 Constitution, the court must choose between barring further prosecution or  
22 suppressing – as the California Court of Appeals did in this case – the  
23 state's most probative evidence.

24 *Trombetta*, 104 S.Ct. at 2533.

25 In reversing the decision suppressing the Intoxilyzer test results, *Trombetta* noted that the  
26 California authorities did not destroy respondents' breath results in a calculated effort to circumvent the  
27 disclosure requirements established by *Brady v. Maryland* and its progeny. The court also accepted that  
28 the officers were acting in good faith and in accord with their normal practice and that the record  
29 contained no allegation of official animus toward the defendants or a conscious effort to suppress  
30 exculpatory evidence. The Court further stated:

31 More importantly, California's policy of not preserving breath samples is  
32 without constitutional defect. Whatever duty the Constitution imposes on  
33 the States to preserve evidence, that duty must be limited to evidence



1 which might be expected to play a significant role in the suspect's defense.  
2 To meet this standard of constitutional materiality, see *United States v.*  
3 *Agurs*, 427 U.S., at 109-110, 96 S.Ct., at 2400, evidence must both possess  
4 an exculpatory value that was apparent before the evidence was destroyed,  
and be of such a nature that the defendant would be unable to obtain  
comparable evidence by other reasonably available means. Neither of  
these conditions is met on the facts of this case.

5 *Id.*, 104 S.Ct. at 2534.

6 *Trombetta* went on to hold that the accuracy of the Intoxilyer had been reviewed and certified by  
7 the California Department of Health and test procedures had been implemented to ensure that the  
8 Intoxilyer tests were performed properly before the test results were admissible in evidence. Thus, the  
9 chances were extremely low that preserved breath samples would have been exculpatory. The Court  
10 concluded that it was much more likely that preserved breath samples would be inculpatory rather than  
11 exculpatory. Secondly, the Court stated that defendants had other reasonably available means to present  
12 their defense by raising issues regarding the alleged reliability of the Intoxilyer test or through cross-  
13 examination of the law enforcement officers who administered the tests in an attempt to raise doubts  
14 whether the tests were properly performed.

15 In *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), the defendant  
16 was convicted of child molestation, sexual assault and kidnaping. The defendant's conviction was based  
17 in part on the victim's eyewitness identification of the defendant as the perpetrator. The state was  
18 allegedly negligent in failing to properly preserve semen and blood samples found on the victim's  
19 clothing which could have been tested to determine whether they matched the defendant's blood or  
20 semen type. The tests performed by the state on the samples after they had deteriorated were  
21 inconclusive. Although the samples were made available to the defendant's expert for testing, he  
22 declined to conduct tests on those samples. The Arizona Court of Appeals reversed the defendant's  
23 conviction based on the expert testimony at trial that timely performance of tests with properly preserved  
24 samples could have produced results which might have completely exonerated the defendant. In  
25 reversing and reinstating defendant's conviction, the Supreme Court held that in addition to the two  
26 requirements of *Trombetta*, that defendant show that the evidence possessed an exculpatory value that  
27 was apparent before the evidence was destroyed and that the defendant would be unable to obtain  
28 comparable evidence by other reasonably available means, defendant was also required to show that the

1 state's failure to preserve the evidence was done in bad faith. *Id.*, 109 S.Ct. at 337. The Court stated that  
2 the failure of the police to refrigerate the clothing and to perform timely tests on the semen samples was  
3 negligent at worst. The Court also noted that defendant had not shown that the police knew the semen  
4 samples would have exculpated defendant when they failed to perform certain tests or to preserve the  
5 victim's clothing by refrigerating it. *Id.*, 109 S.Ct. at 336-37.

6 Based on *Trombetta* and *Youngblood*, the Ninth Circuit held in *United States v. Cooper*, 983  
7 F.2d 928, 931 (9<sup>th</sup> Cir. 1993), that in order to establish a Constitutional Due Process violation based on  
8 the government's failure to preserve evidence, the defendant must show (1) that the unavailable evidence  
9 possessed exculpatory value that was apparent before the evidence was destroyed; (2) that defendant was  
10 unable to obtain comparable evidence by other reasonably available means; and (3) that the government  
11 acted in bad faith in failing to preserve the evidence. In *Cooper*, the government charged the defendants  
12 with operating an illegal methamphetamine laboratory. The defendants maintained that they operated a  
13 legitimate lab that made legal chemical products such as a fuel additive and naval jelly. Prior to  
14 indictment, the government seized a reaction vessel and other equipment that was allegedly used to make  
15 methamphetamine. The defendants' attorney requested that the government return the vessel which was  
16 used in defendant's legal manufacturing process and further informed the DEA agent that the reaction  
17 vessel was critically engineered to make dextran sulfate and could not withstand the high temperatures  
18 required to make methamphetamine. Even though the DEA agent knew that the vessel would be  
19 destroyed pursuant to DEA policies for disposing of hazardous materials, the agent told defendants'  
20 attorney that the vessel was being held as evidence. The agent, however, took no steps to preserve the  
21 vessel for evidence or inspection and it was buried in a toxic waste dump by the government's  
22 contractor. After the vessel was discarded, the defendant's counsel wrote to the Assistant United States  
23 Attorney ("AUSA") in charge of the case, expressing his hope that the government had completed its  
24 analysis of the vessel and again requested that it be returned. The AUSA responded by stating that  
25 vessel was being held as evidence.

26 Applying the foregoing requirements, *Cooper* affirmed the district court's dismissal of the  
27 indictment. First, the Ninth Circuit found that the government was on notice that the reaction vessel  
28 possessed exculpatory value before it was destroyed based on the information provided by the

1 defendants' counsel that the vessel was used in a legal manufacturing process and that as modified and  
2 configured could not withstand the high temperatures required to manufacture methamphetamine.  
3 Second, the court held that absent the ability to have their expert examine the vessel in the condition it  
4 existed at the time defendants acquired and used it, defendants did not have the ability to present a  
5 complete defense and there was no other reasonably available evidence that would be comparable to the  
6 destroyed equipment and an expert's evaluation whether it could have been used to make  
7 methamphetamine. Finally, the court held that the government's failure to take steps to preserve the  
8 evidence after being notified by the defendants of its alleged exculpatory nature and in misrepresenting  
9 that the equipment was being held as evidence established the government's bad faith.

10 In this case, Defendant has presented evidence through the testimony of Defendant's brother  
11 Larry Latham and Defendant's computer expert Adrian Mare that the three computers used the same  
12 modem and wireless router to connect to the Internet and that the three computers were networked  
13 together to permit the users of the computers to share data in a common or shared folder. Mr. Mare  
14 testified that if the hard drives on the two desktop computers were available for examination, he could  
15 determine who used those computers and when they were used. Although not clear from his testimony,  
16 the inference is that by examining the hard drives on the two desktop computers he would be able to  
17 determine if someone used those computers to connect to a child pornography website and download  
18 images of child pornography.

19 Mr. Mare's testimony indicates that a user of the other computers would generally have only been  
20 able to download or transfer data to the shared folder on Defendant's laptop computer. Mr. Mare  
21 testified, however, that he has examined Defendant Latham's laptop computer and that the images of  
22 child pornography on that computer are not located in the shared or networked folder. Instead, the  
23 images are located in the "Card Shop" folder in the laptop computer, in well organized and labeled  
24 folders or files. The "Card Shop" folder, and the folders or files therein, are not shared folders that users  
25 of the two desktop computers would have been able to access. Mr. Mare also testified that he can  
26 determine from the laptop computer when Defendant or someone using his identifying information  
27 accessed the Internet.

28 . . .

1 Defendant would have a more credible argument that the Government had a duty to preserve the  
2 generic computer and the “E-Machine” computer (assuming that the hard drive on that computer could  
3 have been examined) if the alleged images of child pornography had been discovered in the shared  
4 network folder used by the three computers. As Defendant’s own expert testified, however, the alleged  
5 images of child pornography on the laptop computer are located in well organized folders or files located  
6 in a non-shared program or folder. Defendant presented no testimony or evidence indicating that  
7 someone “hacked” into the laptop computer and placed images of child pornography in the non-shared  
8 program or folder. Nor has Defendant shown that if such “hacking” occurred, it could not be determined  
9 though examination of the laptop computer, but could be determined through inspection of the other two  
10 computers.

### 11 CONCLUSION

12 Defendant has therefore failed to make the requisite showing under *Trombetta*, *Youngblood* and  
13 *Cooper* that unavailable evidence possessed exculpatory value that was apparent before the evidence was  
14 destroyed and that defendant is unable to obtain comparable evidence by other reasonably available  
15 means. The lack of exculpatory value regarding the two other computers is also circumstantially  
16 supported by the fact that Defendant’s expert did not request that the desktop computers be made  
17 available for his examination until May or June of this year. The evidence presented by the Defendant’s  
18 witnesses also does not support an inference that the Government acted in bad faith in not preserving the  
19 desktop computers. Accordingly,

### 20 RECOMMENDATION

21 **IT IS RECOMMENDED** that Defendant Robert Myron Latham’s Motion to Dismiss for Failing  
22 to Preserve Potentially Exculpatory Evidence (#116) be **denied**.

### 23 **NOTICE**

24 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in  
25 writing and filed with the Clerk of the Court within ten (10) days. The Supreme Court has held that the  
26 courts of appeal may determine that an appeal has been waived due to the failure to file objections within  
27 the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure  
28 to file objections within the specified time and (2) failure to properly address and brief the objectionable

1 issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of  
2 the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United*  
3 *Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

4 DATED this 14th day of August, 2008.

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6   
7 GEORGE FOLEY, JR.  
8 United States Magistrate Judge  
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